

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ISMAEL ROUN LES,

Appellant.

No. 36589-8-II

UNPUBLISHED OPINION

Hunt, J. — Ismael Roun Les appeals his jury convictions for the following crimes: five counts of firearm theft, five counts of second degree unlawful firearm possession, and one count of bail jumping. He argues that he received ineffective assistance of counsel because (1) he and his defense counsel suffered a breakdown of communication, (2) defense counsel failed to hire an investigator, (3) defense counsel failed to advise him of the correct sentencing consequences, and (4) defense counsel failed to ask the State to stipulate to his (Les's) prior felony convictions in lieu of proving and naming specific prior convictions. In his pro se Statement of Additional Grounds for Review¹ (SAG), Les alleges the following additional errors: (1) He received ineffective assistance because his defense counsel failed to challenge his (Les's) "unmirandarized"² pre-arrest statements to a deputy, (2) the trial court erred when it denied his motion to dismiss the charges for lack of a corpus delicti, and (3) the prosecutor engaged in misconduct by commenting

¹ RAP 10.10.

² *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

in closing argument on his (Les's) failure to testify. We affirm.

FACTS

I. Background

A. Missing Guns

In February 2007, Ismael Roun Les moved into Lloyd Daniel Colvard's two-story Olympia home. Colvard stored five rifles and shotguns in an unlocked closet downstairs. Both Les and Colvard had access to both floors, but Colvard, whose hip problems limited his mobility, lived in the upstairs portion of the home and Les lived downstairs. Although Colvard rarely went downstairs, some time at the end of January or February 1, 2007, he observed that his guns were still in the downstairs closet. On February 27, however, after Les had moved in, Colvard discovered that his guns were missing.

Suspecting that Les had taken his guns, Colvard called him immediately and told him to come home because they needed to talk. When Les arrived, Colvard asked him where the guns were, and Les admitted that he had taken them. But Les claimed that he had given the guns to Aaron Meyers, who worked at Olympic Firearms in the Nisqually Valley, so that Meyers could clean them as a surprise for Colvard. Colvard told Les that he wanted the guns back and asked Les for Meyers' telephone number; Les refused.

Les had not, in fact, given Meyers any guns to clean. Nevertheless, after Colvard's confrontation, Les asked Meyers to contact a man named "Dan" (Colvard) and to tell Dan that he (Meyers) had some guns that he was cleaning and repairing for Les. Even though Meyers did not have the guns, he complied; called Colvard the next day; and told Colvard that he (Meyers) had

the guns, that he was cleaning and repairing them, and that the cleaning and repairs would take a couple of days. Meyers did not, however, give Colvard any information about where the guns were or where he (Meyers) lived.

On March 1, Colvard again called Les to ask about the missing guns. Les agreed to take Colvard to see the guns, but Les did not show up. After waiting a few hours, Colvard called Meyers, who apparently told Colvard that he (Meyers) did not have the guns.

Colvard called Les again. This time Les told Colvard that he had the guns in the trunk of his car but that he was out of town. Having just seen Les's car parked outside his parents' house in Lacey, where Les was then apparently staying, Colvard suspected that Les was lying. When Colvard called Les a third time, Les said that he was on his way home with the guns. When Colvard got off of the phone with Les, he called the sheriff's office.

B. Les's Unmet Promise to Return the Guns

About 20 minutes later, Colvard met Thurston County Deputy Sheriff Nathan Konschuh, outside an elementary school near Les's parents' home. Colvard told Konschuh about the five missing guns, which he (Colvard) believed that Les had taken, and that he wanted his guns back. Konschuh and Colvard drove to Les's parents' home, where they found Les sitting in a car outside.

In Konschuh's presence, Colvard again confronted Les about the missing guns. Les again admitted that he had taken Colvard's guns, but this time he claimed that he had taken them to a friend in Tumwater to have them cleaned as a surprise for Colvard. Colvard responded that he had not given Les permission to take the guns and that he wanted them returned. Les let

Konschuh and Colvard look in his car's trunk, but the guns were not there. Colvard and Konschuh agreed to give Les time to retrieve the guns, and Les agreed to return them to Colvard the next day.

On March 2, Les told Colvard, that he had the guns and wanted to meet to return them. But Les never showed up. On March 6, Colvard contacted Konschuh and told him that Les still had not returned the guns. Neither Colvard nor Konschuh were able to reach Les again.³ On March 8, Konschuh turned the case over to Thurston County Sheriff Detective David Haller.

C. Investigation

Detective Haller learned that Les was a convicted felon and, therefore, could not legally possess or own any firearms. On March 8, Haller interviewed Colvard, who confirmed that Les had not returned the missing guns. Colvard also told Haller about his telephone conversations with Meyers,⁴ who had admitted that he did not have the guns. On March 9, Haller contacted Meyers at Olympic Arms.

After speaking with Haller, Meyers confronted Les and told him that Colvard had contacted the police, he (Meyers) no longer wanted to be involved, and he wanted Les to resolve the matter. Les told Meyers that (1) he (Les) had talked to the guns' owner; (2) the missing guns would be returned shortly; and (3) although he (Les) had not taken the guns and did not have them in his possession, "he had an opportunity to get these guns back but he needed time to do that."

³ Apparently Les never returned to Colvard's home.

⁴ Colvard did not tell Haller that he had a gun with him when he first confronted Les.

Haller interviewed Les on March 9.⁵ Les denied having taken the guns and claimed that he had told Colvard that he (Les) had the guns so he could “buy some time to try to help get the firearms back.” But Les did not tell Haller who had taken or who had the guns; nor did he provide any information to help Haller locate the guns.⁶ Les did not tell Haller that Colvard had had a gun with him when they first spoke about the missing guns.

II. Procedure

The State charged Les with five counts of theft of a firearm and five counts of second degree unlawful possession of a firearm. When Les failed to appear at a May 30, 2007 status hearing, the State amended the information to add one count of bail jumping.

A. Pretrial

Les rejected the State’s plea bargain offer. He did not challenge the admissibility of his statements to Kenschuh or Haller.

Immediately before trial began on July 18, the trial court discussed a June 22, 2007 letter from Les to defense counsel that Les had filed with the court, complaining that counsel had not provided him with copies of the discovery, which he (Les) needed to make decisions about his case. The trial court explained to Les that in most cases a defendant was not entitled to copies of the discovery. Nevertheless, defense counsel noted that Les had received a redacted copy of the discovery material on July 16.

⁵ Before interviewing Les, Haller advised Les of his *Miranda* rights, which Les had waived. *Miranda*, 384 U.S. at 436.

⁶ As of the date of trial, Colvard’s guns were still missing.

Les told the trial court that (1) he had written additional letters that apparently indicated he was “distraught” over his counsel’s representation, (2) defense counsel had not advised him of his due process rights, and (3) defense counsel had promised to hire an investigator but had failed to do so. Les did not, however, request appointment of new counsel.

Defense counsel responded that (1) he was ready to go to trial; (2) he had been unable to hire an investigator and had interviewed some of the witnesses himself; (3) he did not believe he had discovered anything during his investigation that would require him to recuse himself from the case; (4) he had advised Les to accept the State’s plea bargain offer to recommend 132 months confinement, which had been open until July 16, rather than risk a sentence of 37 to 42 years by going to trial; but (5) Les had rejected the State’s offer.

The trial court explained to Les the charges that he was facing and told him that if the jury found him guilty, the sentences for the firearm-related offenses would run consecutively. Les confirmed that defense counsel had already told him this information. Les then asked the trial court to “define the 14th Amendment, Article I, Section 3, personal rights.” The trial court refused, stating that defense counsel had advised Les of the potential consequences of going to trial. The trial court then verified that the State was ready for trial and was unwilling to extend the plea bargain deadline.

B. Trial

The case proceeded to trial. The State’s evidence is summarized above.

1. Motion for mistrial

During cross examination, defense counsel asked whether Colvard owned a revolver.

When Colvard stated that he did, defense counsel asked if he had had the revolver with him when he first confronted Les about the missing guns. Colvard responded that (1) he had “stuck [the revolver] down in the cushion beside [him],” so it was not visible to Les, in case Les did not come home alone; (2) Les “did not see the revolver until after he admitted” that he had taken the guns; (3) he (Colvard) had not threatened Les with the revolver; and (4) he (Colvard) had not told Kenschuh or Haller that he (Colvard) had had a hidden gun with him when he had first confronted Les about the missing guns.

Defense counsel moved for a mistrial, asserting that he (counsel) was now a witness because (1) he had interviewed Colvard over the phone; and (2) when he (counsel) had asked Colvard whether he owned a revolver, Colvard had responded that he did not have one. Outside the presence of the jury, defense counsel asked Colvard whether he remembered the call and whether he remembered defense counsel’s asking whether he (Colvard) owned a revolver. Colvard stated that although he recalled two telephone calls from defense counsel, he (Colvard) did not recall defense counsel’s having asked him about a revolver.

The trial court then swore in defense counsel to present an offer of proof. Defense counsel testified that he had had three conversations with Colvard and that his notes of those conversations included the following: “‘Where did you have guns?’ ‘Closet, where I have baseball cards.’ ‘Handguns, all rifles.’ ‘What rifles?’” Report of proceedings (RP) at 68. Defense counsel asserted that during this discussion, he had not asked Colvard only about the type of guns he kept in the closet; rather, he (defense counsel) had “specifically asked [Colvard] whether he had a handgun or a revolver.” RP at 70. Defense counsel acknowledged that when

he interviewed Colvard, he had information suggesting that Colvard had had a gun with him when he first confronted Les;⁷ but defense counsel testified that he never asked Colvard whether he had had a gun with him when he first confronted Les about the missing guns. Rather, once Colvard denied having a handgun, he (defense counsel) took Colvard at his word and asked no follow up questions; nor did counsel enlist an investigator to pursue this subject further.

The trial court acknowledged the parties' proposed stipulation that someone had interviewed Colvard and that Colvard had denied having a handgun. Although defense counsel agreed to the stipulation, the State argued that defense counsel was not entitled to introduce testimony or a stipulation to contradict Colvard's testimony about this "collateral matter." Defense counsel responded that Colvard's apparently inconsistent responses were relevant to Colvard's credibility. The trial court ruled that this evidence was inadmissible and collateral, regardless of which witness offered the evidence. The trial court rejected the proposed stipulation and denied defense counsel's motion for mistrial.

2. Proof of prior convictions

To prove that Les had a prior felony conviction that prohibited him from owning or possessing firearms, RCW 9.41.040(2), the State presented an April 5, 2005 judgment and sentence showing that Les had five felony forgery convictions.⁸ Defense counsel did not object to

⁷ Defense counsel testified that he could not disclose how he learned that Colvard might have had a gun when he confronted Les.

⁸ The April 2005 judgment and sentence is not in the record before us on appeal. Apparently, however, this judgment and sentence showed that Les had also been convicted of an additional forgery under a separate cause number.

this exhibit. Nor does the record show that defense counsel asked the State to stipulate generally to the existence of a prior felony conviction.

3. Motion to dismiss

After the State rested, Les moved to dismiss the charges for lack of a corpus delicti.⁹ The trial court denied the motion, relying in part on the fact that Les had asked others to make false statements for him and the circumstantial evidence that Les had stolen the guns. Les presented no witnesses.

4. Closing argument

In closing argument and rebuttal, the State summarized the evidence, including the statements Les had made to several witnesses, which the State argued was circumstantial evidence that Les had stolen Colvard's guns, thereby having possessed the guns.

During rebuttal argument, the State also noted that the jury had heard no evidence of Colvard's having pointed a gun at Les. At no time during closing argument, however, did the prosecutor mention that Les had not testified.

The jury found Les guilty as charged.

C. Sentencing

At sentencing, defense counsel conceded that (1) Les's prior forgery convictions were not the "same criminal conduct" under RCW 9.94A.589(1)(a), because the records showed these offenses occurred on different dates; and (2) the trial court was required to run Les's current firearm theft and unlawful possession sentences consecutively. Les also addressed the trial court

⁹ Although defense counsel did not specify, it is clear that Les was moving to dismiss the theft and unlawful possession of a firearm charges, not the bail jumping charge.

directly and asserted that (1) his current firearm related offenses were the “same criminal conduct,” (2) his prior forgeries were also the “same criminal conduct,” and (3) he “vaguely” recalled that his defense counsel had told him that his offender score was one point.

Rejecting Les’s arguments, the trial court found that his offender scores were 7 for each of the theft and unlawful possession convictions and 16 for the bail jumping conviction. The trial court sentenced Les to 57 months confinement for each of the theft charges, 33 months for each of the unlawful possession of a firearm charges, and 51 months for the bail jumping charge, the low end of the standard range for each offense. Except for the bail jumping sentence, the trial court ran all of the sentences consecutively, for a total term of 450 months confinement.¹⁰

Les appeals.

ANALYSIS

I. Effective Assistance of Counsel

Les argues that he received ineffective assistance of counsel because of a breakdown of communication with his defense counsel and because of defense counsel’s failure (1) to hire an investigator, (2) to advise him of the correct sentencing consequences, and (3) to ask the State to stipulate to his (Les’s) prior felony convictions generally rather than to present proof of the specific convictions by name. These arguments fail, either on their merits or because they depend on matters outside the record.

¹⁰ See RCW 9.94A.589(1)(c).

A. Standard of Review

We review an ineffective assistance of counsel claim de novo. *State v. S.M.*, 100 Wn. App. 401, 409, 996 P.2d 1111 (2000). To prove ineffective assistance of counsel, Les must show both deficient performance and prejudice. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). “If either part of the test is not satisfied, the inquiry need go no further.” *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Counsel’s performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). We give great judicial deference to defense counsel’s performance and begin our analysis with a strong presumption that counsel was effective. *Strickland*, 466 U.S. at 689; *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

If the defendant’s arguments depend on matters outside the record before us, we cannot address the issue on direct appeal. *See McFarland*, 127 Wn.2d at 335, 338 n.5. A personal restraint petition is the appropriate method to obtain review of matters outside the record.

B. Breakdown in Communication

Les asserts that (1) defense counsel did not believe his claim that he had lied to Colvard about having the guns because he felt threatened by Colvard, (2) defense counsel refused to listen to his (Les’s) “concerns,” (3) defense counsel made disparaging statements about the case, and

(4) Les wanted to testify but counsel refused to allow it. Les also appears to assert that due to this breakdown in communication, he (Les) refused to believe defense counsel's evaluation of the case, which adversely affected his decision to go to trial. In support of these arguments, Les cites several letters and a bar complaint. The bar complaint is not in the record. The only letter in the record is Les's June 22, 2007 letter to his counsel, complaining that he (Les) had not received copies of the discovery.

The law does not entitle Les to verbatim copies of all discovery. CrR 4.7(h)(3). Furthermore, nothing in the record suggests that defense counsel did not adequately advise Les about these discovery materials in time to evaluate whether to accept the State's offered plea bargain. Accordingly, Les fails to establish ineffective assistance of counsel on this ground.

The record before us is also devoid of anything affirmatively showing that: (1) Les told defense counsel that Colvard had threatened him; (2) defense counsel did not believe Les's claim that Les had lied to Colvard about having the guns because he felt threatened by Colvard; (3) defense counsel refused to listen to his (Les's) "concerns"; (4) defense counsel did not believe Les's version of the events; (5) defense counsel made disparaging statements about the case; or (6) Les wanted to testify, but defense counsel refused to allow it. Because this argument is either not supported by the record or depends on matters outside the record, we do not address it further. *See McFarland*, 127 Wn.2d at 338 n.5.

C. Failure to Hire an Investigator

Les also argues that he received ineffective assistance because defense counsel failed to hire an investigator. He asserts that (1) if defense counsel had hired an investigator, the

investigator could have testified at trial that “Mr. Colvard lied to Counsel when Mr. Colvard told Counsel that he didn’t have a pistol,” (2) defense counsel told him (Les) that he would hire an investigator, and (3) counsel’s failure to do so eroded their attorney-client relationship.

Les’s defense was that he lied to Colvard about having taken the guns to have them cleaned because he (Les) felt threatened by a gun that Colvard had with him when he (Colvard) confronted him (Les). Les appears to assert that an investigator would have been able to inform the jury that Colvard had lied to defense counsel when he (Colvard) said that he (Colvard) did not own a pistol. But what Colvard would have told an investigator is pure conjecture. We agree with the trial court that such impeachment evidence on a collateral matter would have been inadmissible, regardless of who offered it. Moreover, Les does not challenge this trial court ruling on appeal, either by assigning error to it or by arguing its underlying merits. Thus, Les fails to establish ineffective assistance on this ground.

In addition, Les’s claim that counsel’s failure to hire an investigator eroded their attorney-client relationship appears to relate to matters outside the record. Accordingly, we do not address it. *See McFarland*, 127 Wn.2d at 335, 338 n.5.

D. Sentencing Consequences

Les also appears to argue that he lost confidence in defense counsel because counsel repeatedly miscalculated his (Les’s) offender score.¹¹ In support, Les cites his own argument at sentencing and documents that are not part of the record. The record of the sentencing hearing shows that Les may have been confused about or disagreed with defense counsel’s statements.

¹¹ We note that Les does not otherwise appear to challenge his sentence.

But this confusion or disagreement alone does not establish ineffective assistance of counsel or a complete breakdown in communications. Because the remainder of Les's argument relies on matters outside the record, we do not address it further. See *McFarland*, 127 Wn.2d at 335, 338 n.5.

E. Failure to Stipulate to Prior Generic Convictions

Les next argues that defense counsel was ineffective in allowing the State to present a judgment and sentence showing that Les had five prior forgery convictions and one additional forgery conviction under a different cause number, instead of asking the State to stipulate that Les had a prior unnamed, qualifying felony conviction. The State counters that defense counsel's failure to request a stipulation was a reasonable tactical decision to ensure that the jury knew Les's prior offenses were "comparatively minor," non-violent offenses so it would not presume that Les was guilty of something far more serious.

Regardless of whether defense counsel should have requested such stipulation, Les cannot establish that this potential error was prejudicial: The evidence of Les's guilt was overwhelming, based on his own repeated admissions that he had taken the guns. Furthermore, the nature of the prior forgery convictions was not highly prejudicial. Accordingly, we conclude that there was no reasonable probability that the outcome of the trial would have differed had defense counsel successfully requested a stipulation that Les had a prior qualifying conviction. Thus, Les cannot establish ineffective assistance of counsel on this ground.

F. SAG Argument

In his pro se SAG, Les argues that he received ineffective assistance because his defense

counsel failed to challenge the admission of Les's "unmirandized" statements to Kenschuh. This argument also fails.

Miranda warnings are not required during pre-arrest questioning unless the questioning involves custodial interrogation by a state agent. *State v. Post*, 118 Wn.2d 596, 605, 826 P.2d 172, *amended by*, 837 P.2d 599 (1992). A person is not in custody unless an objectively reasonable person in similar circumstances would not feel free to leave. *State v. Short*, 113 Wn.2d 35, 41, 775 P.2d 458 (1989).

The statements Les challenges were statements that he made to Kenschuh before he (Les) was under arrest. Nothing in the record establishes that Les was in custody when he made these statements. Because the record does not show that Les was in custody or under arrest, Les fails to show that *Miranda* warnings were required. Thus, he fails to establish that his defense counsel's performance was deficient or that he suffered any prejudice because his defense counsel failed to challenge the admission of these statements. Accordingly, Les does not establish ineffective assistance of counsel on this ground.

II. Other SAG Arguments

Les also argues in his SAG that (1) the trial court erred when it denied his motion to dismiss for lack of corpus delicti, and (2) the prosecutor engaged in misconduct by commenting in closing argument on his (Les's) failure to testify. These arguments also fail.

A. Corpus Delicti

Les argues that the trial court erred when it denied his motion to dismiss for lack of corpus delicti. We disagree.

1. Standard of review

In Washington, a defendant's admission or confession, standing alone, is insufficient to establish the commission of a crime, i.e., the corpus delicti of the crime. *State v. Pineda*, 99 Wn. App. 65, 76-77, 992 P.2d 525 (2000); *State v. Burnette*, 78 Wn. App. 952, 955, 904 P.2d 776 (1995), *review denied*, 128 Wn.2d 1010 (1996). There must also be independent evidence of an injury or loss and evidence "that someone's criminal act caused the injury or loss." *Burnette*, 78 Wn. App. at 955. And, in cases where a defendant's identity is an element of the offense, such as here where some of the charges were for unlawful possession of a firearm, identity is also part of the corpus delicti. *State v. Wright*, 76 Wn. App. 811, 816-18, 888 P.2d 1214, *review denied*, 127 Wn.2d 1010 (1995) *superseded by statute on other grounds by* RCW 9.94A.364(6).

We review de novo the trial court's decision finding sufficient evidence of the corpus delicti. *Pineda*, 99 Wn. App. at 77-78. The independent evidence is sufficient to satisfy the corpus delicti requirements if it shows there are "sufficient circumstances which would support a logical and reasonable inference[] of the facts sought to be proved." *State v. Aten*, 130 Wn.2d 640, 656, 927 P.2d 210 (1996) (quoting *State v. Vangerpen*, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995)). The State has the burden of producing evidence sufficient to satisfy the corpus delicti rule; its burden is one of production rather than of persuasion. *Pineda*, 99 Wn. App. at 77. To determine whether the State has satisfied this burden, we review the evidence and all reasonable inferences in the light most favorable to the State. *Id.*

2. Adequate independent evidence

Here, the circumstantial evidence and Les's actions, as contrasted with his statements,

support the trial court's ruling that there was sufficient evidence to survive the corpus delicti challenge. Colvard's testimony established that (1) he had stored his five guns in an unlocked downstairs closet; and (2) the guns were in the closet in January or early February 2007, the guns were missing when Colvard next checked the closet, on February 27. This evidence was clearly sufficient to establish the corpus delicti of the charged crime, namely the theft of the firearms, independent of Les's admissions.

Furthermore, not only did Les have direct access to the guns, his actions after Colvard confronted him also tied Les to the missing guns, including his asking Meyers to call Colvard and to lie about having the guns in his (Meyers') possession. Taking Les's access to the guns and his later actions in the light most favorable to the State, the jury could reasonably infer that Les was the person who took and possessed Colvard's guns. Thus, the trial court did not err when it denied Les's motion to dismiss based on the alleged lack of a corpus delicti.

B. Prosecutorial Misconduct

Les next argues that the prosecutor committed misconduct in his closing argument by referring to Les's failure to testify, thereby violating Les's constitutional right to remain silent.¹² Again, we disagree.

1. Standard of review

To prevail on a prosecutorial misconduct claim, Les must establish both the impropriety of the prosecutor's remarks and their prejudicial effect. *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986), *overruled on other grounds by State v. Hill*, 123

¹² U.S. Const. amend. V; Wash. Const. art. I, § 9.

Wn.2d 641 (1994). We review a prosecutor’s allegedly improper remark in “the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.” *State v. French*, 101 Wn. App. 380, 385, 4 P.3d 857 (2000) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998)), *review denied*, 142 Wn.2d 1022 (2001). It is not misconduct to argue that the evidence fails to support the defense theory. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995).

Prejudice exists only if there is a substantial likelihood that the misconduct affected the jury’s verdict. *State v. Roberts*, 142 Wn.2d 471, 533, 14 P.3d 713 (2000). Failure to object constitutes a waiver of error unless the improper remark was so flagrant and ill-intentioned that caused an enduring and resulting prejudice that could not have been neutralized by a jury admonition. *Russell*, 125 Wn.2d at 86. Les fails to meet this burden here.

2. No prejudice

First, the record does not show that the prosecutor commented directly on the fact that Les did not testify. At most, the prosecutor commented that Les had presented no evidence that Colvard had pointed a gun at him before Les confessed that he had taken the guns.

Second, even assuming, but not deciding, that the prosecutor’s comment suggested that Les had the burden of presenting evidence related to this fact, any such error is not reversible error. The trial court instructed the jury that: (1) it was the State’s burden to prove every element of each offense; (2) “[t]he defendant has no burden of proving that a reasonable doubt exists”; and (3) “[t]he defendant is not compelled to testify, and the fact that the defendant has not

testified cannot be sued to infer guilt or prejudice him in any way.” Clerk’s Papers at 43; 47. We presume that the jury follows the trial court’s instructions. *State v. Hanna*, 123 Wn.2d 704, 711, 871 P.2d 135 (1994), *cert. denied*, 513 U.S. 919 (1994).

Furthermore, defense counsel neither objected to the prosecutor’s comment nor requested a curative instruction. The alleged error was not so flagrant or ill-intentioned that any potential harm could not have been neutralized by a proper admonition. Accordingly, Les’s prosecutorial misconduct claim fails.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Houghton, P.J.

Quinn-Brintnall, J.